

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In re Petition of	)	
	)	
CHARLES W. FORTNER	)	
	)	
To Correct the Commission's Records	)	
	)	
	)	
In the Matter of	)	
	)	
CHARLES W. FORTNER	)	Compliance No. 93F631
	)	
Finder's Preference Request	)	
For Station KNHK827	)	
Licensed to J.E. Sussman	)	
d/b/a Fox Systems	)	
Dayton, Ohio	)	

**ORDER**

**Adopted: November 20, 2001**

**Released: November 21, 2001**

By the Chief, Policy and Rules Branch, Commercial Wireless Division, Wireless Telecommunications Bureau:

**I. Introduction**

1. This order addresses the Petition to Correct the Commission's Records ("Petition") filed by Charles W. Fortner ("Fortner") on August 8, 2000. Fortner requests that the Commission correct its records to properly reflect its decision in the finder's preference action brought by Fortner against station KNHK827 at Dayton, Ohio, which was previously licensed to J.E. Sussman ("Sussman"). This order also addresses Nextel Communications, Inc.'s (Nextel) Petition to Dismiss an application filed by Fortner for the frequencies associated with station KNHK827 and the Cross Motion for Award of Sanctions (Motion) filed by Sussman. For the reasons discussed below, we grant Fortner's Petition, dismiss Nextel's Petition, and deny Sussman's Motion.

**II. Background**

2. The Commission created the finder's preference program in order to relieve the scarcity of spectrum in several frequency bands by creating "new incentives for persons to provide [the Commission

with] information about unconstructed, non-operational, or discontinued private land mobile radio systems ....”<sup>1</sup> Under the finder’s preference program, a person could file a finder’s preference request by presenting the Commission with evidence of a licensee’s noncompliance with certain regulations. Upon recovering channels from a target licensee deemed to be in violation of those regulations, the Commission would then award a dispositive preference for those frequencies to the finder.<sup>2</sup>

3. On October 21, 1993, Fortner filed a finder’s preference request targeting station KNHK827, alleging that the station was not constructed and operational as required by Commission rules.<sup>3</sup> Sussman, the target licensee, did not contest the action. On April 29, 1994, Fortner was awarded a dispositive preference for all five frequencies associated with call sign KNHK827.<sup>4</sup> In the letter awarding the dispositive preference, Fortner was notified that an application for the target frequencies must be filed within 90 days, and Fortner timely filed an application for the five awarded frequencies on June 21, 1994. However, on May 20, 1994, Sussman filed a petition for reconsideration of the finder’s preference award, in which she alleged that two of the frequencies were in fact operational.<sup>5</sup>

4. On July 21, 1995, the Wireless Telecommunications Bureau’s (“Bureau”) Office of Operations found that Sussman had presented sufficient rebuttal evidence regarding the operation of two frequencies and reduced the award to Fortner from five frequencies to three frequencies (861.5625 MHz, 862.5625 MHz, and 863.5625 MHz). In its July 21, 1995 decision, the Office of Operations indicated that Fortner was awarded three frequencies and indicated that “the finder has ninety (90) days from the date of this letter to file an acceptable application with the Commission, following regular application requirements.” The Office of Operations’ July 21, 1995 letter did not dismiss Fortner’s application for five frequencies filed pursuant to the initial award of a dispositive preference. On August 17, 1995, Fortner filed a petition for reconsideration of the July 21, 1995 award, seeking the remaining two frequencies associated with station KNHK827. The Bureau denied Fortner’s petition on February 3, 1997.<sup>6</sup> On March 5, 1997, Fortner filed an application for review, which the Commission denied on October 21, 1999.<sup>7</sup>

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<sup>1</sup> See Amendment of Parts 1 and 90 of the Commission’s Rules Concerning the Construction, Licensing, and Operation of Private Land Mobile Radio Stations, *Report and Order*, PR Docket No. 90-481, 6 FCC Rcd 7297, 7309, ¶ 77 (1991).

<sup>2</sup> The Commission discontinued the Finder’s Preference Program for the 800 MHz Service on December 15, 1995. See Amendment of Part 90 of the Commission’s Rules to Facilitate Future Development of SMR Systems in the 800 MHz Frequency Band, *First Report and Order*, *Eighth Report and Order*, and *Second Further Notice of Proposed Rulemaking*, PR Docket No. 93-144, 11 FCC Rcd 1463, 1634, ¶ 416 (1995).

<sup>3</sup> See Finder’s Preference Request of Charles W. Fortner, dated October 21, 1993.

<sup>4</sup> See Letter from Office of Operations, Wireless Telecommunications Bureau, to Charles W. Fortner, dated April 29, 1994.

<sup>5</sup> See J.E. Sussman Petition for Reconsideration, dated May 20, 1994.

<sup>6</sup> See Letter from W. Riley Hollingsworth, Deputy Associate Bureau Chief, Office of Operations, Wireless Telecommunications Bureau, to Dennis C. Brown, Esq., February 3, 1997 (“PFR Denial Letter”).

<sup>7</sup> See In the Matter of Charles W. Fortner, Finder’s Preference Request for Station KNHK827 Licensed to J.E. Sussman d/b/a Fox Systems, *Memorandum Opinion and Order*, FCC 99-303, released October 21, 1999 (“AFR

5. On January 12, 2000, the Licensing and Technical Analysis Branch (Branch) of the Commercial Wireless Division dismissed Fortner's application for all five frequencies associated with station KNHK827, indicating that the application was dismissed pursuant to the AFR Denial Order.<sup>8</sup> On August 8, 2000, Fortner filed the instant Petition. On September 7, 2000, Sussman filed an Opposition to Petition to Correct the Commission's Records and Cross Motion for Award of Sanctions (Cross Motion). Further, on August 8, 2000, Fortner filed a new application to replace his original application, in order "[t]o assist the Bureau in granting the relief requested, and in an abundance of caution."<sup>9</sup> On September 7, 2000, Nextel Communications, Inc. ("Nextel"), the EA winner for the frequency block covered by the subject application, filed a petition to dismiss Fortner's August 8, 2000 application.<sup>10</sup>

### III. Discussion

6. Fortner was initially awarded a dispositive finder's preference consisting of five frequencies and Fortner properly filed an application seeking authority to operate on all five frequencies. The Commission's *AFR Denial Order*, while denying Fortner's challenge to the reinstatement of two channels to the target, affirmed the award of three frequencies to Fortner. We find it inequitable to deny Fortner authority to operate on the subject three frequencies, which were included in Fortner's initial application. We further find that the Branch erred in dismissing Fortner's initial application for five frequencies. The Office of Operations' decision to reinstate two frequencies to the target licensee, and the Commission's denial of Fortner's Application for Review challenging the reinstatement of two frequencies to the target, does not render Fortner's original application for five frequencies defective and subject to dismissal.<sup>11</sup> The Branch erred in not holding Fortner's properly filed application in pending status during review of any appeal and, upon issuance of a final order, continuing to process Fortner's application consistent with the Commission's final decision confirming the award of three frequencies to Fortner. In the instant case, the Commission determined that a partial award was warranted and therefore Fortner's application should have been processed as a partial grant for the remaining three awarded frequencies. We conclude that the complete dismissal of Fortner's initial application was the result of an inadvertent, ministerial error. Administrative agencies have the authority to correct such errors, and we hereby reinstate Fortner's initial application and grant the application in part for three frequencies: 861.5625 MHz, 862.5625 MHz, and 863.5625 MHz.<sup>12</sup>

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*Denial Order*").

<sup>8</sup> See Notice of Application Dismissal, File No. 670622, FCC 574E, January 12, 2000 ("*Dismissal Notice*").

<sup>9</sup> Fortner Petition at 4.

<sup>10</sup> See Nextel Communications, Inc. Petition to Dismiss, filed September 7, 2000.

<sup>11</sup> We note that neither the Office of Operations' July 21, 1995 partial award letter nor the Commission's *AFR Denial Order* specifically dismisses Fortner's initial application under File No. 670622.

<sup>12</sup> *Chlorine Institute v. OSHA*, 613 F.2d 120, 123 (5<sup>th</sup> Cir.), *cert. denied*, 449 U.S. 826 (1980); *see American Trucking Ass'n. v. Frisco Transportation Co.*, 358 U.S. 133, 145-46 (1958).

7. Because we have determined that Fortner's initial application was erroneously dismissed, his second application filed August 8, 2000 is repetitive and is hereby dismissed. Thus, Nextel's petition to dismiss Fortner's second application is hereby dismissed as moot. Further, Sussman argues in its Motion that an award of sanctions against the finder is appropriate, as Fortner demanded Commission review of the decision to reinstate two frequencies to the target and allegedly abused the Commission's processes in his attempt to harass the target licensee. We find these arguments without merit as Fortner has an absolute right to appeal the Office of Operations' decision to reinstate to the target the channels previously awarded to the finder and we therefore deny Sussman's Motion.

8. Accordingly, IT IS ORDERED that, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, the Petition to Correct the Commission's Records filed by Charles W. Fortner on August 8, 2000 is hereby GRANTED and Fortner's application under FCC File No. 670622 is hereby REINSTATED and is GRANTED IN PART for the following three frequencies: 861.5625 MHz, 862.5625 MHz, and 863.5625 MHz.

9. IT IS FURTHER ORDERED that, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, the Petition to Deny filed by Nextel Communications, Inc. on September 7, 2000 is hereby DISMISSED as moot.

10. IT IS FURTHER ORDERED that, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and section 0.331 of the Commission's rules, 47 C.F.R. § 0.331, the Cross Motion for Award of Sanctions filed by J.E. Sussman and Phil Sussman on September 2, 2000 is hereby DENIED.

11. IT IS FURTHER ORDERED that, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i) and sections 0.331 and 1.937 (d) of the Commission's rules, 47 C.F.R. § 0.331, 1.937 (d), the application filed by Charles W. Fortner on August 8, 2000 is hereby DISMISSED as repetitive.

FEDERAL COMMUNICATIONS COMMISSION

Paul D'Ari, Chief  
Policy and Rules Branch  
Commercial Wireless Division  
Wireless Telecommunications Bureau